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## Criminal Law and Criminology: A Survey of Recent Books

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## RECENT BOOKS

### CRIMINAL LAW AND CRIMINOLOGY: A SURVEY OF RECENT BOOKS

BARD R. FERRALL\*

#### GENERAL POLICY

HENRY RUTH AND KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* (Cambridge, MA: Harvard Univ. Press 2003). 374 pp.

In *The Challenge of Crime*, the authors argue that we still have a very incomplete understanding of the effectiveness of our response to crime, which the authors label as our "criminal response complex." The authors go on to argue that more empirical study is needed, as well as a polyvalent analysis of current existing data. The most important considerations for this analysis are: actual reduction in crime and actual reduction in the fear of crime. The criminal response complex should also be evaluated for its justice and fairness and for its effect on public perception of the legitimacy of the response. The fifth, somewhat separate consideration, is whether a particular policy extends the criminal response complex beyond areas where it is needed, enforceable and effective.

The collected data for these evaluations must be communicated to policy makers. This communication is problematic both because of the mistaken belief in the adequacy of existing methods of data collections and because most of the officials have some type of partisan view. Most reliably collected data only incompletely supports or contradicts particular viewpoints. (The authors present examples where data is presented to support policies, although the validity of the data is questionable.) A more flexible response complex is needed, adapted to different types of crime and offenders and to changes in the crime rate. Policy debates are usually cast in broad, "either-or" terms.

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In the late 1960s the view that crime was a response to poor social conditions, (poverty, etc.) reached its peak, and rehabilitation was the overriding concern of the criminal response. In the 1970s some analysts argued that crime was a rational choice and the preferred option of some, and thus rehabilitation is of little use. A better response is to impose such a heavy cost on the offender that crime would no longer be appealing. As a result of this theory, law enforcement became increasingly strict and expansive. The number of legislatively defined offenses grew each year, the penalties became more severe and mandatory, and arrest and prosecution were pursued in many more situations (punitive responses to "life style offenses," for example). The effects of these policies are most measurable in the growth of the prison population. The crime rate rose sharply in the 1970s and 80s and then fell precipitously through the 90s, with some indication of a slight rise in recent years. The extent to which the decline in the crime rate can be attributed to the current policies requires further evaluation. Imprisonment certainly reduces crime, but this does not answer the question of whether the incarceration rate is disproportionately higher than the correlated reduced rate of crime. A prison population profile analysis does not establish with certainty how much crime is prevented by long-term imprisonment. Imprisonment may be the best response to the habitual criminal, but we cannot reliably predict which offenders are most likely to continue criminal careers. Other factors may explain the crime rate decline as well, such as the economic prosperity and opportunity that was present during the 1990s. Complete evaluation also requires consideration of responses other than arrest, prosecution and imprisonment. The private sector, for example employs many methods (i.e. visible security officers, prevalent surveillance cameras, physical protections of property, etc.) that potentially discourage criminal attempts. The relation of gun ownership and crime also requires specific responses. In place of "gun control," (a broad, simplistic term) the authors propose "criminal gun regulation," and then ask in what circumstances the criminal response complex should be extended to guns. The authors argue that the response should focus on handguns, the identification of those who supply handguns to criminals and the tracking of guns used in crimes. An important example of the expansion of the criminal response complex is the increase of defined drug offenses and of the severity and frequency of their penalty. Of course drug possession and use is only a crime when legislatively defined. In evaluating the current anti-drug law enforcement measures, however, we must first determine the extent to which drugs are associated with other crimes. Finding the nexus of drug use and crime can be difficult. The fact that many studies may be unduly extrapolated makes it hard to establish reliable statistics of drug use. Compounding the problem is the fact that drug users often fit factors generally associated with other criminal activity (e.g., poverty, dysfunctional and abusive family history, low level employment, single marital status). It thus becomes difficult to determine the extent to which drug use "causes" crime.

The response to drug use has been heavily slanted to the "supply," rather than the "demand" side. Law enforcement efforts against use, possession and sale of controlled substances dominate efforts at rehabilitation. The most noticeable effect of this policy is the significant portion of the federal and state prison population composed of low-level drug users. The use of most drugs (except alcohol) fell during the 1990s, but it is not certain how much of the fall correlates with law enforcement as opposed to other factors, such as an aging population.

The authors argue that the criminal response to drugs far exceeds the level that would protect society from crime. As a result, legal institutions may seem less legitimate. Other effects may include police cynicism and corruption, and racial disparity in enforcement's impact. The authors also discuss the seeming contradiction that while alcohol use causes more individual and social harm than drugs, the level of regulation and criminalization of drugs far exceeds that of alcohol. Crime control will always be an emotional issue, but increasing data and knowledge may narrow inevitable differences.

### SEARCH AND SEIZURE

SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* (Rutgers University Press: New Brunswick, NJ, 2004). 172 pp.

The author narrates the events and legal reasoning responsible for the establishment in American law of protection from the arbitrary exercise of governmental power to search persons and places and to seize an individual's possessions. After briefly detailing ancient concerns over privacy of the home found in Biblical and Greco-Roman eras, the author refutes the events leading up to King John's agreement to the *Magna Carta*. Although this document did not so much establish new rights as restore ones established in Saxon custom and no restrictions on the king's power to search were contained in the text, subsequent generations transformed it into the founding document of individual rights in English law. Lord Coke, as both scholar and jurist, was especially important in creating this legend and in establishing many legal rights of the individual. In his theoretical writings, Coke argued that arbitrary, unrestricted searches violated the Charter. As judge and member of the House of Commons, he wrote against many actions of the king as violations of legal rights. In Coke's juridical practice, however, he did not interfere with the use of general search warrants by holding any general search illegal. Later codification of rights, which emerged from the struggle between Parliament and King, did not include search and seizure provisions either. English courts first considered the legality of general search warrants, (i.e., ones not naming a particular person to be searched) in 1763 in a challenge against such a warrant issued by the Secretary of State after the insistence of George III that critical publications be seized. The opinion held the search and seizure illegal (although no remedy was provided) and contained strong language about the danger of general warrants. The opinion was acclaimed in England and widely noted in the American colonies. Little noted, however, was that the basis of the ruling was the Secretary's lack of power; the court acknowledged the *king's* power, under the *Magna Carta*, to issue general warrants.

When general warrants continued to be issued in the colonies, the American colonists mistakenly believed that they were denied their rights as English citizens. A prohibition of all general warrants became an important item in the demand for a bill of rights after the American revolution and the ratification of the Constitution. The ratified text of the Fourth Amendment, according to one interpretation, seems to contain two separate provisions: prohibition of unreasonable searches, and specifications for the validity of warrants. The Supreme Court has taken the view that a proper warrant is a necessary condition for the reasonableness of a search (except in

certain narrowly defined "exigent circumstances"). A few justices, however, have maintained that some warrantless searches, even beyond the exigent circumstances exceptions, could be constitutionally reasonable. Because the Bill of Rights was ruled to apply only to the federal government (until enactment of the Fourteenth Amendment) and because there was very little federal policing action, the Supreme Court did not consider the Fourth Amendment for nearly 100 years. The government's demand for a person's papers and records was held to violate both Fifth Amendment protections against self-incrimination and Fourth Amendment prohibitions against unreasonable searches. Even though government agents had not entered and searched the property, the subpoena demand was held equivalent to a search. The Court ruled that "mere evidence" of a crime could not be seized, although it later changed that rule. In early rulings the courts also held that the remedy for violations of the Fourth Amendment, the text of which specifies no remedy, lay in civil actions against the individual official. In 1911, however, the Supreme Court developed the "exclusionary rule," perhaps the most controversial aspect of Fourth Amendment jurisprudence. Simply stated, the exclusionary rule holds that illegally obtained evidence, even though otherwise reliable and relevant, is excluded from the trial of the defendant. When this rule is applied, very often a probable conviction is lost on grounds other than substantive guilt or innocence. This rule improperly burdens society, critics maintain, when another remedy such as civil action is available. Supporters argue civil suit has not proven to be an adequate remedy in actual practice, and that the rule is necessary to maintain judicial integrity and to prevent implicating the courts in illegal action by executive agencies. This controversy intensified in 1961 when the Court applied the rule to the states. The author argues that the Court at this time correctly viewed the exclusionary rule as an inherent constitutional principal. After the end of the "Warren era," however, the Court viewed the exclusionary rule as a judicially crafted deterrent measure, and has recognized several significant exceptions. The author argues that these exceptions to the exclusionary rule have seriously weakened Fourth Amendment protections. Developing technology also presents important challenges to the Fourth Amendment law. An important question is the physical intrusiveness of devices such as electronic eavesdrops and wiretaps. Wiretapping was held not to violate either the Search clause, since neither the person nor her home were searched, or the Seizure clause, since only "words" were seized. Wiretapping is now controlled by Congressional legislation, although congress significantly weakened wiretap protections after the September 11th attacks. Eavesdropping devices violated the amendment to the extent that a person's property is invaded to plant the device. Recent technological advances such as thermal imaging and aerial surveillance have required the courts to determine which expectations of privacy are reasonable, i.e. that society is willing to protect. The author concludes with a discussion of the tendency in American history to trade liberty for security in times of crisis; this tendency is especially prominent when the expansion of the government's power to survey, search and confine expands.

## RESTORATIVE JUSTICE

DECLAN ROCHE, *ACCOUNTABILITY IN RESTORATIVE JUSTICE* (New York: Oxford Univ. Press 2003). 316 pp.

The term "restorative justice" applies to many different alternatives to established

systems of criminal law enforcement and has not yet been precisely defined. However, the author states that the most attention has been directed to alternatives which center around meetings that bring together the victim, the offender, and of other persons affected by the crime. At these meetings, the offender is usually required to admit to his offense and to tell the others what he did. Victims have the opportunity to speak, to describe the impact of the offense and to seek some explanation from the offender, with an apology as the hoped-for response. Others attending the meeting may also speak. These meetings usually conclude with all parties negotiating a plan by which the offender can try to repair the harm, or "restore" the victim and the community. This plan may also include ways to reintegrate the offender into the community. Communities around the world, from the villages of New Zealand to the inner cities of America are using this method.

Supporters state that this kind of community-based approach to criminal justice existed before the implementation of the modern administrative state and "impersonal" criminal justice. They argue that today's state-administered criminal law enforcement usually marginalizes the victim and fails to repair the harm. Furthermore, supporters point to recent studies of restorative justice methods that show greater satisfaction by the victim, as well as the offender and other interested parties. The author argues, however, that there are risks in restorative justice and that accountability, (understood here as an explanation of the reasons for a decision and the availability of those reasons for review by an independent agent,) is the best way to manage these risks. Case studies of twenty-five programs in six countries, sponsored by a variety of community groups, identified which accountability procedures would best assist the restorative justice process and avoid its risks using seven different criteria. The primary risk, the author argues, is domination of the meeting by a few participants. Other risks include the burdening the victim with numerous, sometimes traumatic or intimidating meetings, and failure of the offender to fulfill the negotiated plan. On the other hand, the victim may dominate the meeting and place vindictive demands on the offender. Arguments comparing current restorative systems with the situation before modern bureaucratic law enforcement ignore important historical facts indicating that the victim found the pursuit of "personal" justice difficult and costly, and that the communal response to crime was often vengeful, perhaps eliding current risks. The author also suggests that the cases chosen for restorative justice may be those most amendable to the method, and that little attention has been paid to problems that may develop as the methods receive wider application.

The author proposes the concept of "deliberative accountability" (verbal accounts by participants which are scrutinized by other participants), as the most reliable protection against meeting domination. Preparation and organization of the meeting, which is not as simple and easy as often supposed, is the first and most important way to prevent meeting domination and other failures. Selection of the participants is also crucial to achieving deliberative accountability. Within the requirements of manageability, a meeting with a substantial and diverse number of participants enhances the likelihood of a satisfactory, enforceable plan. Inclusion or exclusion of the members of the public not otherwise involved with the deliberations remains a problematic aspect of restorative justice. Even though citizen involvement is one of the advantages of the informal system, no general rule as to public attendance at the meeting is proposed here. At the least, the author argues, the meeting's deliberations

should be available for public review. Deliberative accountability within the meeting may also promote accountability outside the meeting. Mechanisms within the program that would support deliberative accountability are discussed, as well as the role of the traditional authority (i.e., the legislature, courts, police and community institutions). The author considers how the traditional institutions, especially the courts, should undertake enforcement when the offender fails to follow the agreed plan. He reports findings that a combination of informal and formal enforcement of agreements produce higher compliance than formal enforcement alone. Judicial review of restorative justice action should be similar to the review of administrative agency action. Rather than scrutinizing the outcome and plan, the court should look primarily to the fairness of the restorative justice meeting and other processes. The author argues that society may have confidence in the outcome of the restorative justice process, so long as protections against potential risks and dangers have been put in place. Deliberative accountability would be an important factor of this type of judicial review. Formal and informal justice providers can work to enhance and enforce each other's work. At various stages of the formal criminal process the decision maker should refer as many suitable cases to the informal system as is feasible. The legislature should develop the rules regarding meeting structure so as to insure deliberative accountability. Similar to judicial review of administrative decisions, reviewing courts should look not to the substance of the restorative plan, but to the fairness of the deliberative process through which the plan was developed. Accountability is a leading concern in modern society. The author's conception of "deliberative accountability" is distinct from other more general types of accountability in that it is ongoing rather than retrospective, and participants are primarily accountable to each other. This allows timely adjustments within the informal system while promoting accountability, and therefore confidence, outside it.